UNITED STATES
v.
MINERAL ECONOMICS CORP.

IBLA 78-74 Decided March 30, 1978

Appeal from decision of Administrative Law Judge Robert W. Mesch allowing placer mining operations on the PW-22A through PW-22H placer mining claims pursuant to the Mining Claims Rights Restoration Act of 1955. Arizona 9083.

Affirmed.

1. Mining Claims: Power Site Lands--Mining Claims Rights Restoration Act

The preservation of important and critical habitats for wildlife is a use warranting the prohibition of mining from an area in accordance with the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1970); however, where the only use shown on eight mining claims is likely destruction of a dove nesting and breeding habitat which has produced only approximately .11 of 1 percent of the 1976 total hunters' kill of over 2-1/2 million doves in the State of Arizona and there is insufficient evidence to establish that the habitat is a critical and important habitat for the doves, an administrative law judge's decision to allow placer mining operations will be affirmed.

APPEARANCES: Fritz L. Goreham, Esq., Office of the Solicitor, U.S. Department of the Interior, for the United States; Hale C. Tognoni, President, for Mineral Economics Corp.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The United States appeals from the October 11, 1977, decision of Administrative Law Judge Robert W. Mesch in Arizona 9083. Judge Mesch held that placer mining operations by Mineral Economics Corp.

will not substantially interfere with other uses of the land within the mining claims and therefore the operations should not be prohibited under the Mining Claims Rights Restoration Act of 1955 (Restoration Act), 30 U.S.C. § 621 (1970). The land within the claims was withdrawn and reserved for a power project on February 19, 1927. The mining claims, PW-22A through PW-22H, were relocated by appellee in 1975. 1/

The Restoration Act opens to entry for location of mining claims public lands withdrawn or reserved for power development or power sites, with certain restrictions and limitations. 30 U.S.C. § 621(a) (1970). The Act authorizes the Secretary of the Interior "to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land included within the placer claim" located on such withdrawn land. 30 U.S.C. § 621(b) (1970). The Secretary is empowered to issue one of the following orders, as listed in 30 U.S.C. § 621(b) (1970):

> (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining.

The hearing was held on December 14, 1976. The United States presented four witnesses, a wildlife biologist, a realty specialist and a mining engineer, all employed by the Bureau of Land Management (BLM), and a small game biologist employed by the Arizona Game and Fish Department. Appellee was not represented at the hearing, although it had received proper notice.

The evidence and testimony at the hearing by the United States indicated that a mesquite bosque, or thicket, exists on portions of the mining claims in varying densities. The bosque forms a nesting habitat for white wing doves and mourning doves. The BLM biologist testified that approximately 2,500 to 3,000 new birds are produced each year from nests in this particular bosque (Tr. 13; Exh. E). The State biologist testified that removal of the bosque as a dove habitat would effectively remove the doves from the Statewide dove population because other dove habitats in Arizona are fully occupied, and in fact the number of available habitats is declining (Tr. 22). Finally, the BLM mining engineer testified that a placer mine could not be operated on the claims without substantially interfering with the vegetation (Tr. 26).

1/ The relocations were of claims previously located by predecessors in interest of appellant.

Following the hearing, appellee requested an opportunity to submit evidence and arguments to Judge Mesch. This was granted and appellee filed maps, copies of publications, other documents, and arguments disputing much of the testimony and evidence at the hearing.

In his decision, Judge Mesch relied primarily on statistics compiled by the Small Game Division, Arizona Game and Fish Department. These showed that in 1974, 2,937,704 doves of both species were killed by hunters in Arizona; that in 1975, 2,734,087 were killed; and that in 1976, 2,623,608 were killed (Dec. 5). Judge Mesch then stated:

> In view of the above figures, it is inconceivable to me that placer mining should be prohibited on any of the eight mining claims simply because it might result in a loss of from 53 to 535 doves per year, depending upon the particular claim involved, or 2,500 to 3,000 doves per year for all of the eight claims. The loss of this number of doves is negligible when compared with the numbers taken by hunters each year.
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> * * * The [Restoration] Act clearly recognizes that the development of mineral resources is in the public interest. It would be an unreasonable application of the Act to prohibit mining on the subject claims simply because 2,500 to 3,000 doves might be lost per year when over two and one-half million doves are lost to hunters each year.

He then concluded that placer mining operations would not substantially interfere with other uses of the land.

The United States, in its statement of reasons, takes strong exception to Judge Mesch referring to the loss of 2,500 to 3,000 doves per year as "insignificant." It argues that loss of these doves is irreplaceable, unlike hunting losses which are replaceable. In fact, preservation of the bosque is necessary so that the hunting losses can be replaced. The United States concludes by arguing that "the reproduction potential of the bosque * * * will be lost forever if the mining operation is allowed."

In its answer to the statement of reasons, appellee offers three arguments. First, it argues that destruction of mesquite habitat does not adversely affect dove nesting if the mesquite is replaced by other forms of trees and vegetation. Appellee suggests that restoration of the land might be an adequate solution. Second, appellee alleges that the bosque exists largely on private land adjoining the mining claims and that the part of the bosque on the claims is sparse and dying due to the Alamo Dam downstream from the claims. Third, appellee disputes that the area is a nesting place for doves, terming

as "circumstantial" the evidence that doves are actually nesting in the bosque, and asserting that the area is not close to feeding areas for the birds.

[1] The record in this case is far from satisfactory. Concerning appellant's contention regarding the vegetation on the claims, Government Exhibit D prepared by the BLM biologist shows by color legend the type of vegetation cover on the eight claims in this appeal. Four of the claims are shown as having no dense mesquite. Two of those are shown with approximately two-thirds sparse mesquite cover; one claim is approximately one-third sparse mesquite; the other is approximately one-fourth sparse mesquite. The remainder of those four claims is flood plain with little or no mesquite. Of the other four claims, one is roughly half sparse and half dense mesquite; the other three claims have a small area of flood plain, some sparse mesquite, and the remainder dense mesquite. It is questionable how suitable at least four of the claims with only some sparse mesquite are as nesting and breeding areas in view of the Government's own evidence.

Regarding appellant's challenge of the estimate of the number of doves produced from the area, we note that the biologist based his estimate upon a formula used by State officials for mesquite dove-producing areas. While it may be true, as appellee contends, that the area is not a good dove-producing area because of potential damage to the vegetation by flooding from a dam and because of a lack of food sources nearby which might affect an estimate, it is evident that some doves have used the area for nesting purposes. For the purpose of this decision, we shall accept the BLM's estimate as an approximate estimate of past and present bird production.

The most important flaw in the Government's case is the lack of specific information and evidence which would establish the impact of the loss of this area for dove production in relation to the loss of the area for mining should it be prohibited. The preservation of important and critical habitats for wildlife is a use warranting the prohibition of mining from an area in accordance with the Restoration Act. United States v. Weigel, 26 IBLA 183 (1976). In Weigel, there was evidence that the area was an important breeding ground for summer chinook salmon and steelhead trout, a critical winter habitat for big game animals, and the area had great aesthetic value for recreation. However, in this case no value is ascribed to the land except the use for dove production. The most that has been shown is an estimated possible loss of a breeding and nesting area that might produce approximately .11 of 1 percent of the 1976 total hunters' kill of over 2-1/2 million doves in the State of Arizona. We do not discount an accumulative affect of the loss of dove breeding and nesting habitats. However, we have nothing by the Government, other than a general statement that nesting and breeding areas are being reduced, which could establish that thisarea should be considered

as an important, critical, vital, or significant habitat for the production of doves. This case is thus clearly distinguishable from the Weigel case.

In short, the present evidentiary record does not sufficiently establish such a substantial use of the land for uses other than mining which warrants a prohibition of mining. Appellant has not contended or shown that a land restoration requirement should be imposed. Indeed, in its brief to Judge Mesch after the hearing, counsel for the United States seems to indicate that a restoration requirement would serve no purpose. Accordingly, we see no basis for changing Judge Mesch's decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Joan B. Thompson
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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Frederick Fishman
Administrative Judge